Office - Supreme Court, U.S.
FILED
AUG 7 1957
JOHN T. FEY, Clerk

LIBRARY
SUPREME COURT U.S.

IN THE

Supreme Court of the United States

October Term, 1957

No. 262

GEORGE P. GWINETT,

Petitioner,

against

ASTRA STEAMSHIP CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals, Second Circuit

BRIEF OF RESPONDENT, ASTRA STEAMSHIP CORPORATION, IN OPPOSITION

J. WARD O'NEILL,
Counsel for Respondent,
Astra Steamship Corporation,
80 Broad Street,
New York 4, N. Y.

WILLIAM P. KAIN, JR.,
On the Brief.

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	2
Statement	2
Argument	5
The Decision Below Is Clearly Correct	5
There Is No Conflict of Decisions	8
There Is No Important Question of Federal Law Presented and the Petition Does Not Warrant Review by This Court	10
Conclusion	11

Table of Cases Cited

Cortes v. Baltimore Insular Line, 287 U. S. 367	5
De Zon v. American President Line, 318 U. S. 660	7
Ferguson v. Moore-McCormack Lines, 352 U. S. 521	7, 8
Jacob v. City of New York, 315 U. S. 752	6
Manhat. v. United States, 220 F. 2d 143, Cert. Den. 349 U. S. 666	6
Matson Navigation Co. v. Hansen, 132 F. 2d 487	6
Munsey v. Webb, 231 U. S. 150	9
Palmer v. Hoffman, 318 U. S. 109	7
Palsgraf v. Long Island R. R. Co., 248 N. Y. 339	9
Roberts v. United Fisheries Vessels Co., 141 F. 2d 288, Cert. Den. 323 U. S. 753	6
Rogers v. Missouri P. R. Co., 352 U. S. 500	9
Schulz v. Pennsylvania R. Co., 350 U. S. 523	7
The Germanic, 196 U. S. 589	9
The Iroquois, 194 U. S. 240	6
Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54	5, 6

Statutes Cited

The Jones Act, 41 Stat. 1007, 46 U. S. C. 688	2
Federal Employers Liability Act, 35 Stat. 65, 45 U. S. C. 51 *et seq.*	2

IN THE

Supreme Court of the United States

October Term, 1957

No. 262

GEORGE P. GWINETT,

Petitioner,

against

ASTRA STEAMSHIP CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals, Second Circuit

BRIEF OF RESPONDENT, ASTRA STEAMSHIP CORPORATION, IN OPPOSITION

Opinions Below

There was no opinion in the District Court. At the close of the trial after the jury returned a verdict for respondent on both causes of action set forth in the complaint, the Trial Judge denied petitioner's motion to set aside the verdict and for a new trial (A. 28a *).

The opinion of the United States Court of Appeals for the Second Circuit is officially reported at 243 F. 2d 8, and is set forth in the Appendix on pages 9 to 11 of the petition. The Court of Appeals' opinion is unofficially reported at 1957 American Maritime Cases 980.

* A. 28a refers to petitioner's appendix below.

Jurisdiction

The jurisdictional requisites are adequately set forth in the petition.

Questions Presented

1. Whether the United States Court of Appeals for the Second Circuit was correct in holding that the District Judge properly charged the jury in a suit under the Jones Act that the actions of a ship's officer should be measured by what a reasonable man would do under the circumstances.

2. Whether the United States Court of Appeals was correct in holding that the Trial Judge properly refused to instruct the jury to the effect that a work order given to a subordinate by a ship's officer was negligent if, in carrying out the order, the subordinate was injured.

Statutes Involved

Plaintiff brought the action under the Jones Act 41 Stat. 1007, 46 U. S. C. 688, which incorporates the Federal Employers Liability Act, 35 Stat. 65, 45 U. S. C. 51 *et seq.*

Statement

The statement of the case set forth in the petition outlines only the testimony of petitioner and his witnesses at the trial. The testimony of respondent's witnesses has been passed over as of no importance although it is apparent from the verdict that this was the testimony given credence by the jury.

The generator cylinder head cover, which petitioner claims he was attempting to replace at the time he sus-

tained his injury, was estimated by petitioner to weigh from 50 to 70 lbs., although he did not know its actual weight (A. 1b).* The Chief Engineer estimated that the cover weighed 20 to 25 lbs. (A. 17b). The impression is created in the petition that petitioner was furnished assistance when the generator was disassembled. However, the vessel's Chief Engineer testified that the actual physical work was done by plaintiff without assistance (A. 21b). Petitioner's testimony at the trial that the Chief Engineer ordered him to re-assemble the generator during his morning watch on July 4, 1951, was controverted by his own log book entry which showed that no work was done on the generator during that watch (A. 8b, 9b). Petitioner admitted that he could have required the engine room personnel on his watch to perform any tasks which he might have assigned to them since they were already being paid overtime for the July 4th holiday (A. 9b). Indeed petitioner first reported the injury on July 7, 1957, three days after it allegedly occurred (A. 17b, 18b).

There is no claim that the vessel or her appliances were unseaworthy (A. 21b).

While it is fruitless to speculate upon the jury's reasons for its verdict, it is clear that the jury rejected petitioner's testimony that his back condition resulted from lifting the cylinder head cover. The doctor for petitioner as well as the doctor for respondent testified at the trial that they would expect a man of petitioner's age and build to lift such a cover without incident (A. 13b, 14b, 16b). In fact the doctors were in agreement that petitioner's condition could have been brought about by such simple acts as sneezing, coughing, bending over, twisting, lifting or even by a misstep (A. 12b, 13b, 15b, 16b).

At the trial the jury, after deliberating for several hours, advised the Court that they could not agree upon a

* A. 1b refers to respondent's appendix below.

verdict. The Trial Judge thereupon requested the jury to continue its deliberations in order to, if possible, obviate the necessity for a new trial. Before the jury again retired the following colloquy took place:

> "*The Foreman*: Your Honor, who can we ask a few questions?
>
> *The Court*: Well, if you have any questions about the evidence or about the charge or anything like that—
>
> *The Foreman*: Yes, but who would we be able to call in to clear the minds of the two—
>
> *The Court*: Well, I will tell you what you can do: write out the questions. We cannot send anybody into the juryroom . . ." (A. 24a. 25a.)

The jury then retired and shortly thereafter submitted the question set forth on page 4 of the petition. It is thus apparent that the conclusion drawn by petitioner, that the jury gave credence to his testimony that he was refused assistance because it would necessitate payment for overtime, is completely unwarranted. On the contrary, the record indicates that the question was submitted at the behest of only two of the jurors. There is no logical basis for an assumption that a question intended to clarify an issue for two of the jurors is indicative of a determination by the entire panel. The argument could be advanced with equal validity that the jury found that the job of replacing the cylinder head cover was a "one-man job".

Petitioner argues that the Trial Judge's answer to the jury's question was not responsive. Respondent disagrees. The Trial Judge correctly instructed the jury, after considering the question, without objection from petitioner's counsel, that it was not a question of what the Chief Engineer had a right to do in the sense of labor relations, but rather a question of whether it was negligence on the part of the Chief Engineer to direct petitioner to do the work without assistance. The Court further instructed the jury:

> "Now the question of fact which you have, therefore, is this: Was it negligence in the sense of not using reasonable care to say to this man, 'You go ahead and do that job and we won't provide a helper for you?' Was it negligence for him to do that? That is a question which you—drawn from different walks of life—ordinary, reasonable human beings must decide as a question of fact. It is not what I can decide as a question of fact. That is a question of fact for you to decide on that issue." (A. 27a)

Argument

It was conceded by petitioner on the trial that the vessel was seaworthy (A. 21b). The only obligation that respondent, through its officers, owed to petitioner was reasonable care as to any dangers to him which might be apprehended. The only standard of conduct to which the Chief Engineer was required to conform to avoid being negligent was that of a reasonable man under like circumstances. In the absence of an unseaworthy condition aboard the vessel no liability attached to the shipowner where this standard was met. The standard of care required of the Chief Engineer is the same under both the Jones Act and the General Maritime Law.

The petition presents no substantial question of law and the decision of the Court of Appeals does not conflict with those in other Circuits. Review by this Court is therefore unwarranted

The Decision Below Is Clearly Correct

This Court has repeatedly stated in its opinions that neither the Jones Act nor the Federal Employers Liability Act have established a new definition of negligence. *Cortes* v. *Baltimore Insular Line*, 287 U. S. 367, 377; *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 67.

The standard of conduct required of the shipowner and his representatives is that of a reasonable man under similar circumstances. *Tiller v. Atlantic Coast Line R. Co., supra; The Iroquois*, 194 U. S. 240, 243; *Matson Navigation Co. v. Hansen*, 132 F. 2d 487, 488 (9 Cir.); *Roberts v. United Fisheries Vessels Co.*, 141 F. 2d 288, 292 (1 Cir.), Cert. Den. 323 U. S. 753 (1944).

The rule is well established that for an act to be negligent it must be one which in the light of all the surrounding circumstances could have been foreseen by a reasonably prudent man as likely to result in an injury. It is obvious that the exact occurrence or the precise nature of the injury need not be foreseen but only that some injury might result from the act. The necessity for the foreseeability of harm as an essential element of negligence was clearly enunciated in *Manhat v. United States*, 220 F. 2d 143, Cert. Den. 349 U. S. 666. In that case plaintiff and his co-employees were working in a life boat suspended over the ship's side. Plaintiff was injured when the boat in which he was working fell to the pier to which the ship was moored. It was determined at the trial that the accident was caused by the manipulation of the life boat's automatic releasing gear which was in good condition at the time. The Court in discussing plaintiff's contention that the shipowner was negligent in failing to take additional precautions to secure the life boat said, at page 147:

> "The preponderance of evidence adduced at the trial fully supports the Trial Court's determination that the prospect of the falling of a life boat under the circumstances presented here did not possess those elements of reasonable foreseeability which would impel the conclusion that reliance upon the Rottmer-type releasing gear constituted a failure to exercise that degree of care which could be expected of a reasonable man."

See, also:

Jacob v. City of New York, 315 U. S. 752, 756;

Here the Trial Judge quite properly and in conformity with recent pronouncements of this Court in *Schulz v. Pennsylvania R. Co.*, 350 U. S. 523, and *Ferguson v. Moore-McCormack Lines*, 352 U. S. 521 left the determination of the question as to whether the Chief Engineer acted as a reasonably prudent man to the jury.

Although not considered by the Court below because of its holding that the case was properly submitted to the jury on the merits, an additional ground exists for the denial of the petition for writ of certiorari. Petitioner having failed to object to either the Trial Judge's initial or supplemental charges (A. 19a, 27a) is precluded from assigning error to these charges for the first time on appeal. *Palmer v. Hoffman*, 318 U. S. 109, 119.

Petitioner's requests to charge, which were refused by the Trial Judge (p. 5 of Petition); incorrectly state the applicable rule of law. Both requests assume that petitioner requested the Chief Engineer to furnish him with assistance in re-assembling the generator. The requests completely ignore the fact that respondent produced testimony at the trial to controvert petitioner's claim that such a request was made. The giving of these charges to the jury would be tantamount to instructing the jury, that the shipowner was liable for any injuries sustained by the petitioner whether the shipowner was negligent or not and, regardless of whether petitioner had requested any assistance. In effect petitioner contends that consideration of the questions of credibility and negligence should not be left to the jury. This contention is completely untenable since the Jones Act does not impose liability without proof of negligence. *De Zon v. American President Line*, 318 U. S. 660, 671.

There Is No Conflict of Decisions

Petitioner alleges on pages 5 through 7 of his petition that the decision of the Court of Appeals is in direct conflict with decisions of this Court. Petitioner does not claim that the decision conflicts with any decisions of the Courts of Appeal for the various Circuits.

Petitioner insists that the Court of Appeals' decision in this case conflicts with the decision of this Court in *Ferguson v. Moore-McCormack Lines*, 352 U. S. 521. On the contrary, the *Ferguson* case affirms the applicability of foreseeability of harm as a pertinent test. This is evident from a consideration of the opinion, an abbreviated portion of which is set forth on page 6 of the petition. This Court said, at page 523:

> "Respondent urges that it was not reasonably foreseeable that petitioner would utilize the knife to loosen the ice cream. But the jury, which plays a pre-eminent role in these Jones Act cases (Jacob v. City of New York, 315 U. S. 752; Schulz v. Pennsylvania R. Co., 350 U. S. 523), could conclude that petitioner had been furnished no safe tool to perform his task. It was not necessary that respondent be in a position to foresee the exact chain of circumstances which actually led to the accident. The jury was instructed that it might consider whether respondent could have anticipated that a knife would be used to get out the ice cream. On this record, fair minded men could conclude that respondent should have foreseen that petitioner might be tempted to use a knife to perform his task with dispatch, since no adequate implement was furnished him."

It is apparent that the Court of Appeals was correct in its evaluation of the holding in this case when it said in its per curiam opinion (p. 10 of the Petition):

> "Our decision in the Ferguson case was reversed because it was thought that on the evidence the issue

of negligence had properly been left to the jury. Here, the issue was properly submitted to the jury and resulted in a verdict adverse to the plaintiff."

The case of *Rogers* v. *Missouri P. R. Co.*, 352 U. S. 500, cited at page 6 of the petition, is not in point. The holding in the *Rogers case* is certainly not in conflict with the decision of the Court below. In the *Rogers* case this Court held that a plaintiff in a suit under the Federal Employers Liability Act was entitled to a jury determination of the issues in all but those cases, where fair-minded jurors could not honestly differ as to whether the fault of the employer played any part in the employee's injury, and used the language quoted on page 6 of the petition. As previously stated, the Trial Court in this case properly left the issues to the determination of the jury under a proper charge. Petitioner's statement, on page 6 of the petition, that the Chief Engineer knew and ordered that plaintiff lift the cylinder head without assistance again ignores the testimony of respondent's witnesses, which testimony was accepted by the jury.

Respondent does not dispute the proposition for which *The Germanic*, 196 U. S. 589, is apparently cited on page 7 of the petition. It is only necessary that the actor, in the light of all the surrounding circumstances, be able to see that some injury might reasonably be expected to result from his acts. *Munsey* v. *Webb*, 231 U. S. 150, 156; *Palsgraf* v. *Long Island R.R. Co.*, 248 N. Y. 339. The "reasonable man" standard of conduct is an objective criterion and is not, as indicated in the petition, dependent on the actor's conscious realization of the possibility of harm resulting from his actions.

There Is No Important Question of Federal Law Presented and the Petition Does Not Warrant Review by This Court

The petition presents nothing more than the question of whether the Trial Judge's charge to the jury that, in a suit under the Jones Act, petitioner was only entitled to a recovery for negligence; that it should measure the conduct of respondent's Chief Engineer by what a reasonably prudent man would do in the light of all the surrounding circumstances; that if the Chief Engineer's actions were in conformity with the standard of conduct to be expected of a reasonably prudent man and he could not reasonably foresee that they would result in an injury to the petitioner, then the respondent shipowner would not be liable. Petitioner urges that the Trial Judge was required to, in effect, instruct the jury that if petitioner sustained an injury during the course of his work aboard the vessel he was entitled to recovery against the respondent.

The petition advances no convincing argument for such a radical departure, as petitioner urges, from decisions in this and other Courts and no cases are cited in the petition to substantiate the position taken by him.

Petitioner is in reality re-arguing the issues which were decided adversely to him by the jury at the trial. A reading of the record shows that the jury's verdict was abundantly supported by the evidence at the trial. The Trial Judge's instructions to the jury were not objected to until after a verdict adverse to petitioner had been returned.

CONCLUSION

For the foregoing reasons it is respectfully urged that the petition for a writ of certiorari should be denied.

Respectfully submitted,

J. WARD O'NEILL,
Counsel for Respondent, Astra Steamship Corporation.

WILLIAM P. KAIN, JR.,
On the Brief.